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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, *et al.*,

Petitioners,

—v.—

NATHALIE NORRIS, on behalf of herself and all others similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF TEACHERS INSURANCE AND ANNUITY ASSOCIATION and COLLEGE RETIREMENT EQUITIES FUND AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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PRELIMINARY STATEMENT

By consent of all parties, Teachers Insurance and Annuity Association and College Retirement Equities Fund ("TIAA-CREF") submit this brief as *amici curiae* in support of petitioners. This brief addresses the absence of any proof of discriminatory intent in this Title VII dis-

parate treatment case and the legitimate, non-discriminatory justification for the challenged use of sex-distinct mortality tables. For the reasons stated herein, the decision of the Ninth Circuit finding that petitioners ("Arizona") had violated Title VII should be reversed.

INTEREST OF THE AMICI

TIAA and CREF are insurers providing annuities to persons employed in higher education. While our interest here in certain of the questions raised is substantial, we recognize that there are a number of other related issues not directly involved here. This is due, in large part, to the differences between Arizona's plan and the typical plan adopted by institutions in the TIAA-CREF system. Arizona's plan is a completely voluntary deferred compensation plan with a cash option. Those in the TIAA-CREF system are insured pension plans requiring, for the most part, mandatory participation and providing lifetime annuity income but no cash option. The primary concern of Arizona is the "open market" exception to the holding in *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), while the scope of the issues raised in the litigation involving TIAA-CREF referred to below is much broader.

One dispositive issue raised here and also in the TIAA-CREF litigation, however, is the requirement that a plaintiff show discriminatory intent to prevail in a Title VII disparate treatment case. The bulk of this brief is devoted to the legal consequences of respondents' failure to make any such showing below. The following preliminary material is offered as background to a discussion of the use of sex-distinct mortality tables in general and in defined contribution pension plans in particular.

A. The TIAA-CREF System

TIAA is a non-profit legal reserve life insurance and annuity company organized under New York law in 1918. CREF is a not-for-profit corporation created in 1952 as a companion organization to TIAA. TIAA and CREF employer-sponsored pension plans provide annuity contracts to employees of non-profit educational and research institutions.

More than 700,000 persons presently have contracts with TIAA-CREF and more than 3,400 institutions have TIAA-CREF retirement plans. Over 85% of all private four-year colleges and universities and 40% of all public colleges and universities have retirement plans funded through TIAA and CREF contracts. The TIAA-CREF contracts are "portable"; that is, the benefits are fully vested and immediately funded under individual contracts that employees retain wherever they may transfer employment, even if they leave higher education. Contributions by and on behalf of similarly situated male and female employees are equal.

Under the terms of each participant's separate contract, as each contribution is made, it is immediately credited to an individual account established for each employee and purchases the right to lifetime annuity benefits or a death benefit prior to retirement. The TIAA-CREF annuity contracts under these pension plans do not permit the participant to obtain a lump sum payment of the contract's value (*i.e.*, a "cash option"). Rather, the contracts require that benefits be paid to the participants only in the form of lifetime annuity income.

Both TIAA and CREF are closely regulated by the New York State Insurance Department and are subject to the New York Insurance Law. Pursuant to the requirements

of the Insurance Law, TIAA and CREF contracts and other materials reflecting the use of sex-distinct mortality tables are submitted to and approved by the Insurance Department.

TIAA-CREF's use of sex-distinct mortality tables has been challenged under Title VII in ten separate actions in federal courts. Decisions in three of these actions[1] form much of the legal framework upon which other similar actions have been decided. The lower court opinions in this action are based upon many of the holdings announced in those decisions.

B. Annuity and Insurance Principles

Even though an insurer is not here a party, the present issue of Title VII discrimination nonetheless should be understood in the context of certain actuarial principles fundamental to annuities and life insurance which were not addressed in the lower court opinions. The following brief summary of those principles is offered, therefore, as a basis for the discussion which follows.

The purpose of an annuity is to insure individuals against the financial risk of "living too long" by guaran-

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1 *Spirt* v. *Teachers Insurance and Annuity Association*, 29 Fair Empl. Prac. Cas. (BNA) 1599 (2d Cir.), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. November 9, 1982) (No. 82-791); *Peters* v. *Wayne State University*, Nos. 79-1658, -1670, -1671 (6th Cir. October 14, 1982), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. November 10, 1982) (No. 82-794); and *Equal Employment Opportunity Commission* v. *Colby College*, 589 F.2d 1139 (1st Cir. 1978).

The Court of Appeals decision in *Peters* is as yet unreported and is set forth in the Appendix hereto. Citations to material in the Appendix appear as "____ a."

teeing that they will receive a stated level of retirement income, regardless of how long they may live. An insurer can commit to a rate of payment only by application of what is called the statistical law of large numbers, which essentially provides that, given a large enough body of data respecting similar risks, the accuracy of predictions made based upon that data approaches certainty. By applying this principle, an insurer, although it cannot identify in advance *which* incidents of risk will occur, can predict *how many* will occur within a large group of persons presenting similar risk characteristics and thus obligate itself to provide benefits accordingly.

At the same time, insurers such as TIAA-CREF face the conflicting requirement of recognizing the equities of each of the participants in his or her individual accounts. "Equity" in insurance means that the insureds are entitled to receive in benefits the full, or equitable, value of the premiums they have paid and the earnings thereon, in light of the risk they present. If individuals perceive that they are being treated inequitably by an insurer (*e.g.*, by paying too high a premium for the value of the coverage they receive), they will eventually withdraw from the pool.

Equity in insurance is achieved through a process called risk classification. The insurer attempts to group or classify persons according to the degree of risk (here, anticipated longevity) presented. Each of the persons within each of those groups then pays the same premiums and receives the same benefits. Individuals are thereby protected from being overcharged, and the insurer is protected from the results of undercharging, as would occur if separate groups were not established.

The factors taken into account in classifying risks for annuities are those that are stable, significant and objectively measurable.[2] Age and sex are the only such risk classification factors that meet this test, and they are universally used by insurers in issuing annuities.

The significance of gender to mortality risk appears clearly from TIAA-CREF's own mortality data, which are reviewed annually and are particularly credible in light of the large number of annuitants involved. Studies of TIAA-CREF annuitants during 1965-70 show, for example, that at ages 66-70 men's rate of death was two-and-one-half times that of women. The data also show that the male mortality rate is greater, at every age, than the female mortality rate. At age 65, a typical retirement age, the female annuitants in the TIAA-CREF system have a life expectancy of approximately 22 years, while the males' life expectancy is then approximately 18 years.

Because women on average live more years than similarly situated men and accordingly require a greater number of annuity payments, more money is required to pay annuity benefits to women at the same periodic rate as paid to a like group of men. Conversely, given equal accumulations at retirement for men and women, benefits must be paid at a lower periodic rate to the women in order to avoid exhausting the funds accumulated by and for the women while many of them are still living.

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2 *See* Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits*: Manhart *Revisited*, 49 U. Chi. L. Rev. 489, 499-501 (1982) [hereinafter cited as "Benston"].

C. The Significance of Questions Not Raised in *Norris*

While a common theme of *Norris*, and the TIAA-CREF cases, *Spirt* and *Peters*, is the question of *Manhart's* proper scope and application, the holding in *Manhart* poses widely divergent, but very important, questions for various segments of the insurance and pension industry and those who transact business with them. Further, no single case in which the use of sex-distinct mortality tables has been challenged, including *Norris*, raises all of the significant questions. Because the issues *not* raised in *Norris* are, nonetheless, related to or interdependent with some of those that are, a brief discussion of certain of them is appropriate.

i. Insurer's justification for the use of sex-distinct tables

A number of significant issues left unanswered by *Manhart* are not directly raised by *Norris* because there is no insurer involved here as a party. An insurer's justification for the use of sex-distinct mortality tables, for example, and a trial court record supporting that justification, are absent. Every insurer establishing individual accounts for its participants faces the requirement of "equity" while at the same time being able to guarantee each annuitant an income for an indeterminant "lifetime." The use of a sex-distinct mortality table achieves this goal.

Manhart, in which an employer-operated plan with no individual accounts was at issue, does not require insurers to disregard equity, nor in insured pension plans, does it require the men or the employers to subsidize the women. *See* pp. 24-25, *infra*. In *Peters*, where individual accounts established by insurers for each participant were involved,

the court held that *Manhart* did not compel any finding there of Title VII discrimination. 7-8a.

To decide, as the Ninth Circuit did, that Arizona discriminates merely because it deals with insurers which engage in the challenged use of sex-distinct mortality tables is tantamount to deciding that the insurer's actions may not be justified and that such justification would be immaterial. Any such decision should, rather, be based upon an insurer's articulated reasons for the use of those tables and a substantiating trial court record, as it was for example in *Peters*.

ii. The McCarran-Ferguson Act

The absence of an insurer as a party here also means that the exemption from unintended federal intervention into the "business of insurance" provided by the McCarran-Ferguson Act ("the Act") is also not *directly* involved. The Act (15 U.S.C. §§ 1011 *et seq.* (1976)) is designed to foster continued state regulation of the business of insurance without the conflicting application of federal legislation, such as Title VII, where there is no specific reference to that "business" as required by the Act. There is here no direct federal-state struggle over the regulation of insurers as in *Spirt*, pitting the EEOC against state insurance commissioners. To decide, however, that petitioners' actions may be enjoined as violative of Title VII would be to permit an effective, though indirect, regulation of insurers where the Act would otherwise forbid it. The purposes of the Act would be nullified if a state's determination that the use of sex-distinct tables was not discriminatory could be relied on by an insurer only at the sacrifice of its clients.

iii. Retroactivity

Finally, no question of any claimed retroactive effect of the relief granted is here under scrutiny. Assuming, *arguendo*, that some form of relief is appropriate in this case, any required "equalization" of benefits presents very serious problems for employers and insurers. To pay females greater periodic annuity benefits in the TIAA-CREF system, for example, would obviously require an infusion of money from one of two sources: employers or males. If the equalization is to be achieved at the males' present level (*i.e.*, "topping up"), the employer is the only source of the money which would be needed to accomplish such a result. If a level of equalization between the present male and female levels is desired (*i.e.*, "unisex"), the cost of higher benefits to the women would be borne by the males because the value of premiums paid by them in the past would be reduced.

An award applicable to any past contributions, whether for persons now retired or not yet retired, would grant retroactive relief forbidden by *Manhart*. To rule that employers must add additional moneys now to supplement past contributions would simply be another way of declaring—for the first time—that their original pension obligations were not fulfilled. Any forced subsidization of women by a reduction of men's annuities would also frustrate the latter's expectations that their annuity benefits would be calculated on the basis of the risk they present.

The enormity of an award requiring equalization of periodic benefits would either place extreme financial strain on employers (in the TIAA-CREF system on the already overburdened resources of higher education) or require the weight of increased pension costs to fall upon

innocent third parties—the males—both results contrary to the clear warnings this Court issued in *Manhart*. 435 U.S. at 720-23.

D. Analysis of This Disparate Treatment Claim Under Title VII

An issue raised below, but largely ignored by the Ninth Circuit, is the requirement that discriminatory intent be demonstrated for a plaintiff to prevail in a Title VII disparate treatment case such as that here. No such intent to discriminate appears here. Moreover, it would seem, Arizona has articulated a legitimate non-discriminatory reason for its challenged actions, and plaintiffs have made no showing whatever that the articulated justification was a pretext covering a desire to harm women. Under the rationale of cases such as *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), and *Peters*, respondents here have thus not made a sufficient showing to prevail under Title VII. It is to this issue that we now turn.

SUMMARY OF THE ARGUMENT

The decision of the Ninth Circuit is at odds with the rule requiring a plaintiff to show discriminatory intent or animus to prevail in a Title VII disparate treatment case. This rule, recently reiterated in *Burdine*, would require plaintiffs to demonstrate that annuities using sex-distinct mortality tables in the calculation of benefit rates were offered as an option for the specific purpose of disadvantaging women. In rejecting plaintiffs' constitutional claim, the district court found no such intent.

Even assuming that plaintiffs have proven a *prima facie* case of Title VII discrimination, Arizona would

appear to have articulated a legitimate, non-discriminatory reason justifying its actions: no other option was available to it. Insurers universally use sex-distinct mortality tables because reference to gender (1) is more equitable: the greater the risk assumed, the lower the periodic benefit paid; (2) more accurate: greater precision in estimating longevity is achieved by recognizing the difference between male and female mortality rates; and (3) promotes soundness: the obligations of the annuity fund will match the available resources for payment of annuities.

Annuities exist because no one can accurately predict the length of an individual's life. Studies purporting to show a coincidence or "overlap" in dates of death of a group of otherwise similarly situated males and females, made *after they have died*, are essentially irrelevant.

Finally, this Court's holding in *Manhart* does not compel the result reached by the Ninth Circuit. Even in *Manhart*, where the discrimination was found to exist "on [the] face" of the plan, this Court preserved the opportunity to show that the use of sex as a risk classifier was "reasonably necessary to the normal operation" of the plan. 435 U.S. at 716 n.30. The reasons supporting the use of sex-distinct tables set forth below satisfy the test of *Manhart*.

The decision of the Ninth Circuit should be reversed.

ARGUMENT

REVERSAL IS REQUIRED BECAUSE PLAINTIFFS FAILED TO DEMONSTRATE THAT DEFENDANTS ACTED WITH AN INTENT TO DISCRIMINATE AGAINST WOMEN

A. Discriminatory Motivation Must Be Shown for Plaintiffs to Prevail

The decision of the Ninth Circuit respecting discriminatory intent or animus in Title VII disparate treatment cases focuses on *Manhart* in which the issue was not discussed, and ignores, *e.g.*, *Burdine*, in which the subject was treated at length. The result is a finding of discrimination where admittedly no intent to discriminate was present.[3] Such a result, we submit, is in error.

The subject of discriminatory intent or animus as a prerequisite to Title VII claims of disparate treatment has been raised and litigated in a host of cases. *E.g.*, *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 579-80 (1978); *Board of Trustees* v. *Sweeney*, 439 U.S. 24, 25 (1978) (*per curiam*); and *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792, 802-05 (1973). Thus, in *Furnco*, reiterating the rationale of *McDonnell-Douglas*, the Court stated (438 U.S. at 579-80) that a plaintiff's *prima facie* evidence of disparate treatment under Title VII is "simply proof of actions taken by the employer from which we infer discriminatory animus . . . ," which inference may be rebutted by the defendant. The Court

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3 The district court found no "purposeful invidious gender-based discrimination" in Arizona's arrangements with independent insurers and thus found no violation of the Fourteenth Amendment below. 486 F. Supp. at 651.

went on to leave no doubt that a "determination as to motivation" must be made in considering such a claim. *Id.* In that respect a plaintiff is also entitled to attempt to prove that the defendant's explanation is a mere pretext, covering a discriminatory intent. *Id.* But, as stated in *Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977), "proof of discriminatory intent is critical" in a disparate treatment case.

Most recently, in *Burdine*, 450 U.S. at 253, also a Title VII case, this Court reaffirmed the rule (citing *Sweeney*) that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." The intent requirement set forth in *Burdine* is no mere fact-finding mechanism, but an affirmative, substantive burden on plaintiffs and a necessary element of their case. *Loeb* v. *Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979); *Ligons* v. *Bechtel Power Corp.*, 625 F.2d 771, 773 (8th Cir.), *cert. denied*, 449 U.S. 983 (1980); and *Jackson* v. *U.S. Steel Corp.*, 624 F.2d 436, 442 (3d Cir. 1980).

Virtually every other Circuit Court to have addressed this question since *Furnco* has reached the same conclusion.[4] For example, as the First Circuit stated in *Loeb* v.

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4 *E.g.*, *Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1011-14 (1st Cir. 1979); *Sweeney* v. *Board of Trustees*, 604 F.2d 106, 108-09 (1st Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980); *Knight* v. *Nassau Cty. Civil Service Comm'n*, 649 F.2d 157, 161 (2d Cir.), *cert. denied*, 454 U.S. 818 (1981); *Scott* v. *Univ. of Delaware*, 601 F.2d 76, 80-81 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979); *Wright* v. *Nat'l Archives & Records Service*, 609 F.2d 702, 713-14 (4th Cir. 1979); *Long* v. *Ford Motor Co.*, 496 F.2d 500 (6th Cir. 1974); *Ekanem* v. *Health & Hospital Corp.*, 589 F.2d 316, 319-20 (7th Cir. 1978); *Kirby* v. *Colony Furniture Co.*, 613 F.2d 696, 702 (8th Cir. 1980); *Royal* v. *Missouri Highway and*

Textron, supra, cited with approval in *Burdine*, 450 U.S. at 258, when discussing the proper framework for consideration of claims of disparate treatment, "the ultimate question is . . . whether [the defendant's action] was unlawfully motivated" (600 F.2d at 1014), and the "focus is to be on the employer's motivation . . . and not on its business judgment." *Id.* at 1012 n.6. In rebuttal, "the plaintiff must prove that the defendant's reason was a pretext for discrimination . . . *i.e.,* that the defendant's action was *not* based on the reason given." *Id.* at 1012. (Emphasis in original.) That is, the plaintiff must prove "that, 'but for' his employer's motive to discriminate against him because of . . . [sex]," the employer's action would not have been taken. *Id.* at 1019. No evidence here exists of any discriminatory intent on the part of Arizona, or anyone else, to discriminate against women and, as noted, the district court below found none.

The absence of an intent to harm women in these circumstances is no better demonstrated than by reference to insurers' use of sex-distinct tables in *life insurance*. In life insurance, use of sex-distinct tables results in lower cost of death benefits for women when compared to similarly situated men because, as a group, the rates of women's mortality at all ages are lower. Thus, the practice neither favors one sex nor disadvantages the other. The EEOC in the *Colby* case made the remarkable claim that the effect of the use of sex-distinct mortality tables

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Transportation Comm'n, 655 F.2d 159, 163 (8th Cir. 1981); *Ward* v. *Westland Plastics, Inc.*, 23 Fair Empl. Prac. Cas. (BNA) 128, 129 (9th Cir. 1980); *Piva* v. *Xerox Corp.*, 654 F.2d 591, 594 (9th Cir. 1981); *Coe* v. *Yellow Freight Systems, Inc.*, 646 F.2d 444, 448 (10th Cir. 1981); *Valentino* v. *United States Postal Service*, 674 F.2d 56, 60 n.1 (D.C. Cir. 1982).

was simultaneously to discriminate against all males and all females in the TIAA-CREF system. But, as Judge Aldrich there stated (589 F.2d at 1141):

> The smaller individual annuity payment to women is not a chauvinistic distinction. The use of such mortality tables produces the converse situation in the case of life insurance.

See Benston, *supra*, at 530 n.126.

Insurers continue to monitor changes in mortality rates. If the difference between male and female mortality rates narrows (it has, on the contrary, been widening) differences in benefit rates will also be narrowed. The motive behind using sex-distinct tables is thus the achievement of accuracy, financial soundness and stability, not a desire to harm or discriminate against women in annuities or, for that matter, against men in insurance. Discrimination "*against*" members of one sex or the other, which is prohibited by Title VII (§ 703(a)(1), 42 U.S.C. § 2000e-2(a)(1)(1976)), is quite different from differentiation *between* the sexes, which is what insurers do under state insurance laws. *See* Kimball, *Reverse Sex Discrimination: Manhart*, 1979 American Bar Foundation Research Journal 85, 110-11 (No. 1, Winter).

The application of these principles in the present context is aptly illustrated by *Peters*, which held, *inter alia*, that Wayne State University, the employer, was not liable under either a disparate treatment or a disparate impact theory for choosing TIAA-CREF annuities to fund retirement benefits for its employees. In *Peters*, as here, the District Court held that "defendants did not intentionally discriminate against women. . . ." 476 F. Supp. 1343, 1351 (E.D. Mich. 1979). The Court of Appeals reaffirmed this finding, and, relying on the *McDonnell-*

Douglas/Furnco/Burdine line of cases, held (5-7a) that lack of discriminatory intent precluded liability on a disparate treatment theory:

> Disparate treatment occurs when an employer bases employment decisions on an impermissible criterion, such as sex. An employer need not treat women and men in exactly the same manner. Title VII merely forbids the employer from acting with the intent to discriminate. [Citing *Furnco* and *Burdine*]
>
> * * *
>
> In the present case, Wayne State's retirement plan differentiates between women and men. Female annuitants receive smaller monthly payments than similarly situated male annuitants. Wayne State rebutted this prima facie showing of disparate treatment by articulating a legitimate non-discriminatory reason for treating female and male annuitants differently. Sex-segregated mortality tables are used to calculate payments according to accepted actuarial practices; the tables are sex-segregated simply because women live longer than men. Women receive smaller annuities over a longer period of time to ensure that the value of the retirement plan for women and men is equal.
>
> Plaintiffs failed to carry their ultimate burden of persuasion under the *Burdine* analysis. They did not demonstrate at trial that Wayne State's motivation was discriminatory or improper in any way. Plaintiffs did not show that Wayne State's reliance on longevity to calculate benefits was a pretext to mask its intention to disadvantage and harm female annuitants. Wayne State has not violated Title VII according to a disparate treatment analysis.

B. Fallacy of a *Per Se* Approach

The Ninth Circuit was of the view that the mere use of sex-distinct tables, in and of itself, was "facially discriminatory" (671 F.2d at 334) and thus eliminated any requirement that Arizona's "animus in adopting the plan" be shown (*id.*). Such a *per se* approach to the issue, based solely upon the authority of two Ninth Circuit decisions almost a decade old,[5] completely disregards this Court's repeated statements of a contrary rule. "Facial" discrimination apparently means that a plan, on its face, treats members of one sex differently from members of the other. This, however, is nothing more than "disparate treatment" as defined by this Court in *Teamsters*, 431 U.S. at 335-36 n.15:

> "Disparate treatment" such as is alleged in the present case is the most easily understood type of discrimination. The employer *simply treats some people less favorably than others because of their . . . sex* . . . .
>
> Claims of disparate treatment may be distinguished from claims that stress 'disparate impact.' The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. (Emphasis supplied).

Nor may it properly be suggested that the use of a mortality table with male and female mortality separately stated—the mere act of classification—establishes the

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5 *Krause* v. *Sacramento Inn*, 479 F.2d 988 (9th Cir. 1973); *Schaeffer* v. *San Diego Yellow Cabs, Inc.*, 462 F.2d 1002 (9th Cir. 1972).

discriminatory intent required by Title VII. Under such a *per se* analysis, cases such as *Burdine* and *McDonnell-Douglas* would supposedly be irrelevant here because there is no dispute that such tables were employed. But, as the Court in *Peters* held (6a), the fact that a *distinction between* males and females has been made does not mean that an intent to *discriminate against* one sex or the other has been shown.

If the mere use of the sexual classifications "male" and "female" were enough to establish intentional (and unjustifiable) discrimination, then *Manhart* should have been a simple *per se* decision. It was not. *Manhart* itself establishes that "disparate treatment" is not a *per se* violation of Title VII.[6] This Court there made clear that defendants may show the use of sex-distinct tables to be "reasonably necessary to the normal operation of the . . . retirement plan" and thus justify their actions even if, as was found in *Manhart*, they are discriminatory on their face (435 U.S. at 716 n.30). The defense was available there even though, as observed by the First Circuit, "by accident, or design, *Manhart* brought to the Court the case that presented the fewest difficulties, and the most conspicuous discrimination, if discrimination there were." (*Colby, supra*, 589 F.2d at 1143).

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6 Indeed, even in the context of alleged Constitutional discrimination, this Court has made clear that a *per se* approach does not apply. Thus in *Univ. of Calif. Regents* v. *Bakke*, 438 U.S. 265 at 303 (1978), it was stated that "the Court has never viewed such classification [by gender] as inherently suspect or as comparable to racial or ethnic classifications for the purpose of equal protection analysis"; and that even racial classifications "are not *per se* invalid under the Fourteenth Amendment." *Id.* at 356.

Further, plaintiff's *per se* approach would support the claim that *any* mortality table reflects an intent to discriminate in the case of life insurance against the elderly in favor of the young, and in the case of annuities against the young in favor of the elderly. Just as there is an indisputable and unchallenged relationship between age and mortality (sixty year olds on average live more years than similarly situated sixty-five year olds), there is the same relationship between gender and mortality. Just as no one has seriously suggested that mortality tables reflect an intent to discriminate against the elderly, simple "[c]ommon sense" (*Peters*, 9a) compels the conclusion that there is likewise no intentional discrimination in the use of sex-distinct tables. The insurer's interest is not in sexual discrimination, but in predictions of longevity.

The relationship of gender to longevity is not of the insurer's creation, and if the difference in male-female mortality disappeared, so would the need to use sex-distinct tables. Further, as this Court put it while discussing alleged gender discrimination under the Constitution in *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 277, 279 (1979):

> [D]escribing the preference as "inherently nonneutral" or "gender-biased," is merely to restate the fact of impact, not to answer the question of intent.
>
> * * *
>
> "Discriminatory purpose" . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decision-maker . . . selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group. (Footnote omitted.)

There can be here no valid claim of *per se* liability.

C. The Basis for Arizona's Justification

Arizona here asserts that the "marketplace" limits its ability to provide any other form of annuity for its participants—that no insurer offers annuities that do not take age and sex into account in calculating benefits. The unavailability of other options is, in and of itself, the articulation of a justification avoiding Title VII liability.[7] A factor, not discussed below because of the absence of insurers as parties here, is *why* no other alternatives are made available in the marketplace. The facts in this regard, developed by TIAA-CREF in its own litigation respecting the same issue, are typical and illustrative.

i. Equity, accuracy, soundness

The trial court record made in the *Peters* case, shows that insurers use sex-distinct mortality tables not in order to discriminate against or disadvantage women, but to achieve the nondiscriminatory purpose of greater equity, accuracy and soundness in their retirement plans and that they do so in accord with long-standing and universally accepted actuarial and insurance standards. The district court judge in *Peters* (476 F. Supp. at 1348) fully credited the testimony of defendants' experts that:

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7 Not only is the Ninth Circuit's *per se* approach incorrect, but, in justifying its dealings with independent insurers, all of whom use sex-distinct tables, Arizona did not bear a burden of "persuasion," but rather one of "articulation." Thus, applying *McDonnell-Douglas*, the decision in *Burdine* sets out (450 U.S. at 252-53) the "basic allocation of burdens and order of presentation of proof" in a Title VII discriminatory treatment case. Assuming that the plaintiff has satisfied her burden of establishing a *prima facie* case of discrimination, the defendants may "articulate" (*Sweeney*, 439 U.S. at 25) some legitimate, nondiscriminatory reason for the alleged discriminatory act which, unless shown to be a pretext, will defeat the plaintiff's claim.

> [B]ecause women as a group will live longer, use of separate life-expectancy tables for men and women is necessary to correctly predict the number of monthly payments required for each group of annuitants. This will assure that the total payment to each retiree is "actuarially equivalent," though the periodic payments to women are less.

And, Judge DeMascio there also expressly found that "the defendant's plan utilized proper actuarial considerations and men as a group and women as a group receive the same actuarial value for their money." *Id.* at 1349.

As the District Court found in *Peters*, the only two factors used by insurers in offering annuities are the immutable characteristics of age and sex. (*Id.* at 1348). Plaintiffs there attempted to suggest the relevance of other factors, prompting the Court to respond (*Id.* at 1345 n.2):

> [P]laintiffs contended that they would demonstrate that defendants could use other non-discriminatory life expectancy predictors, such as health, weight, smoking, etc., in computing annuity rates. The evidence, however, demonstrated that only the immutable factors of age and sex could be used.

Some have argued that because race is not considered as a risk classifier for annuities, sex should not be either, it being assumed that the mortality of non-whites' is demonstrably higher than that of whites. The analogy has no basis in fact. General population statistics show that at the higher ages (*i.e.*, those ages relevant for payment of annuity benefits) there is virtually no difference in white—non-white life expectancy. National Center for Health Statistics, 2 *Vital Statistics of the United States* 5-13 (1980). Moreover, the same statistics show that the same difference in *male-female* mortality rates exists for

non-whites as for whites, again confirming the importance of the factor of sex to risk classification for annuities. *Id.*

There can be no dispute that both age and gender have a substantial impact on mortality. Obviously, younger persons will on average live more years beyond a given date than similarly situated older persons. There is also no dispute that females are likely to live a greater number of years than males of the same age—at age 65 some four years more in the TIAA-CREF system. Judge Aldrich spelled out the consequences of greater female longevity in *Colby* (589 F.2d at 1144-45):

> Manifestly, an insurance company cannot disregard this fact, any more than it can disregard age, or fail to require premiums and create reserves that will fund its total ultimate obligations in light of the expectancy of its policyholders. Regardless of what one individual woman may do in the way of paying in and taking out, if women in their totality are to take out more than their male counterparts, either they, or someone else, must pay in more. Even though an individual woman may prove to be shortlived, to add her to the group requires a larger premium contribution than if she had been a man.

Thus, an insurer's use of sex-distinct mortality tables results in more equitable treatment of all annuitants. Men and women, regardless of their age, receive the same actuarial, or present value per dollar of premium paid. But given equal accumulations for men and women in individual accounts, payment of the same periodic benefits to each would mean that every woman would receive an annuity of greater present value than would any man of the same age.

ii. The "overlap"—20/20 hindsight

The Court below referred (671 F.2d at 332 n.1) to an argument sometimes made in support of disregarding sex as a risk classification factor derived from a hindsight comparison of dates of death among similar groups of males and females (labeled " 'overlap' graphs" by the district court in *Peters* (476 F. Supp. at 1345 n.2)). The argument suggests that, using TIAA's current mortality table, approximately 80% of the dates of death for men coincide with dates of death for women. While such graphs confirm that women as a group outlive the men by a substantial margin, they are otherwise essentially irrelevant to the computation and payment of annuities. *See* Benston, *supra*, at 515-17 n.72. In Judge DeMascio's words in *Peters*, where this precise assertion was made, such comparisons are, at best, "inconclusive." 476 F. Supp. at 1345 n.2. The Sixth Circuit agreed (9a):

> Plaintiffs point out that individual women may not live to the predicted statistical age of death and, therefore, may not recover the full actuarial value of their retirement packages. This argument is equally true for men. After death the total benefits received could be calculated to determine whether a man or a woman has received more money. But because annuity payments must be calculated prior to death, insurers and employers must use the only tools available to calculate payments, mortality tables. Both women and men may not live to the predicted statistical age but both women and men have the *same probability* of living to the predicted statistical age. (Emphasis in original).

In essence, the graphs merely reflect the self-evident fact that because there are only a limited number of years within which a group of persons can die after retirement,

a retrospective comparison of their dates of death will always show some sort of "overlap." An almost identical overlap, for example, can be shown to exist where the dates of death of a group of women aged 65 are matched with those for a group of *women* aged 60. Any suggestion that the 60-year-old group should receive benefits at the same rate as the 65-year-old group would be as illogical as the suggestion that a male/female overlap furnishes a serious reason for equalizing male/female benefits. In short, hindsight comparisons of dates of death are of no relevance to the calculation of benefits to be paid in the future to living annuitants whose dates of death cannot be known in advance.

iii. *Manhart* is not to the contrary

Nor can it be said that *Manhart* in any way has rejected the insurance and actuarial justification discussed above. The scope of the decision in *Manhart* was carefully delineated at the outset, when this Court noted that "[n]o private insurance company is involved in the administration or payment of benefits" (435 U.S. at 705) and later when it explained that "we do not suggest that [Title VII] was intended to revolutionize the insurance and pension industries." (*Id.* at 717.) *Manhart* concerned (a) an employer-operated, defined benefit plan similar to those found in industry and government wherein (b) employer contributions are grouped or pooled, not allocated to individual accounts. Retirement benefits in such plans are computed, not from individually accumulated amounts, but pursuant to a formula which normally establishes benefits as a percentage of the employee's final average salary.[8] The cost to the employer to provide equal periodic

8 Thus, the basic option in the *Manhart* plan was a "formula pension" wherein monthly benefits were calculated on the basis of a formula: 2% of average monthly salary paid during the last year of employment times the number of years of employment. 435 U.S. at 705 n.3.

benefits at retirement is greater for women than for similarly situated men. Such "formula benefits" avoid the question of inequity or subsidization that arises from treating different classes of risks the same. *See, e.g., Connolly* v. *Pension Benefit Guar. Corp.*, 581 F.2d 729 (9th Cir. 1978), *cert. denied*, 440 U.S. 935 (1979).

CONCLUSION

Plaintiffs did not demonstrate any intent on the part of defendants to discriminate against women in the use of sex-distinct mortality tables. The use of such tables proceeds, not from any desire to harm women, but from the indisputable difference in male-female longevity. Arizona's inability to find an insurer offering annuity benefits calculated on any basis other than age and sex is a reflection of the importance of those two factors in setting annuity benefit rates. Their use is, accordingly, fully justified. In light of all the foregoing, the finding of Title VII liability against Arizona herein should be reversed.

Respectfully submitted,

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November 26, 1982

Opinion of the Sixth Circuit
in *Peters* v. *Wayne State University*

MILDRED PETERS, et al.,

Plaintiffs-Appellees,

—v.—

WAYNE STATE UNIVERSITY (79-1670), TEACHERS INSURANCE AND ANNUITY ASSOCIATION AND COLLEGE RETIREMENT EQUITIES FUND (79-1658, 79-1671),

Defendants-Appellants.

Nos. 79-1658, 79-1670, 79-1671

United States Court of Appeals,
Sixth Circuit

October 14, 1982

Before:

MARTIN, *Circuit Judge*;
PHILLIPS and BROWN*, *Senior Circuit Judges.*

BOYCE F. MARTIN, JR., *Circuit Judge*

This case requires us to decide whether Title VII prohibits an insurance company from operating or an employer from selecting a retirement benefits plan under which the size of monthly annuity payments is calculated from sex-segregated mortality tables. Wayne State University offers its faculty and certain other employees an annuity pension plan administered by

* Circuit Judge Brown retired from regular active service under the provisions of 28 U.S.C. § 371(o) on June 16, 1982, and became a Senior Circuit Judge.

Teachers Insurance and Annuity Association and the College Retirement Equities Fund. Under this plan, female annuitants receive smaller monthly payments than similarly situated male annuitants. This distinction is based on the actuarial probability that women will live longer than their male counterparts.

The plaintiffs, female employees of Wayne State, brought this sex discrimination action in the District Court for the Eastern District of Michigan. The District Court found that both Teachers Annuity and Wayne State had violated section 703(a) of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-2(a). *Peters v. Wayne State University*, 476 F.Supp. 1343 (E.D. Mich. 1979). We disagree and reverse.

Wayne State is a state-supported university located in Detroit, Michigan. Teachers Annuity is a pair of companies designed specifically to serve the unique retirement needs of academic employees. Teachers Insurance and Annuity Association is a legal reserve life insurance company; College Retirement Equities Fund is a companion corporation organized to provide a greater variety of insurance services. Teachers Annuity enables employees of academic institutions to move from one institution to another because the employees take their personal retirement contracts with them as they move. Five hundred fifty thousand employees at over three thousand institutions contract directly with Teachers Annuity for retirement annuity benefits.

Wayne State does not require its employees to participate in the Teachers Annuity retirement plan. Employees who choose to do so contribute to the fund five percent of their salaries matched by a ten percent Wayne State contribution. Each contribution automatically purchases retirement benefits which vest immediately and irrevocably in the individual employee. At retirement, employees must select among several annuity payment options.

If a woman selects a "single life option," which provides monthly payments for life, she will receive smaller payments than a man of the same age and accumulated contributions. Teachers Annuity computes the annuities from standard mor-

tality tables which reflect the fact that, as groups, women live longer than men. At age sixty-five a woman's life expectancy is four years longer than a man's. To compensate for women's longevity, female annuitants receive smaller monthly payments. However, the present actuarial values of women's and men's benefits are identical.

The District Court found that both Teachers Annuity and Wayne State violated Title VII. Although women and men *as groups* received equal benefits, the District Court relied on *City of Los Angeles v. Manhart*, 435 U.S. 702 (1978), to find that the retirement plan discriminated against the *individual* female annuitant.

Section 703(a) provides in pertinent part:

> (a) It shall be an unlawful employment practice for an *employer*—
>
> (1) to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of . . . sex . . . .

78 Stat. 255, 42 U.S.C. § 2000e-2(a)(1) (emphasis added). Federal courts have construed the statutory language to include, as employers, employers' agents and those to whom employers have delegated responsibility for employee compensation. As the Supreme Court noted in *Manhart*, "[A]n employer can[not] avoid his responsibilities by delegating discriminatory programs to corporate shells. Title VII applies to 'any agent' of a covered employer . . . ." 435 U.S. at 718, n.33.

In the present case, the District Court found that Teachers Annuity was an "employer" within the meaning of Title VII because "[t]he ties between WSU and TIAA/CREF are too great to allow them each to deny liability on account of the actions of the other." 476 F. Supp. at 1350. The court emphasized the fact that Teachers Annuity's "sole reason" for existence was to provide individually vested insurance contracts to employees of educational institutions.

The District Court's characterization of Teachers Annuity as an "employer" is clearly erroneous. Fed. R. Ap. P. 52(a). Obviously Teachers Annuity does not "employ" the plaintiffs in the conventional sense of the word. Neither does Wayne State retain Teachers Annuity as an agent or delegate to it any aspect of employee compensation. *See Los Angeles v. Manhart*. On the contrary, Wayne State determines the eligibility requirements for participation in the Teachers Annuity plans and sets the contribution levels for itself and its employees. Teachers Annuity's responsibility is limited to management of the retirement fund and disbursement of individual annuities. Furthermore, Wayne State exercises no control over Teachers Annuity, otherwise essential to a principal agent relationship. *NLRB v. Local No. 64, Falls Cities District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO*, 497 F.2d 1335, 1366 (6th Cir. 1974). *See generally* 2A C.J.S. Agency § 6; Restatement (Second) Agency § 14. Wayne State cannot control Teachers Annuity's administrative policies once its employees decide to join the Teachers Annuity plan. Indeed, the decision to use sex-segregated mortality tables to compute annuity payments was Teachers Annuity's alone. Wayne State has repeatedly and unsuccessfully attempted to persuade Teachers Annuity to alter its payment policy.

Teachers Annuity is not an "employer" for the purposes of Title VII; Wayne State has selected Teachers Annuity's retirement planning services for its employees. Teachers Annuity is an insurance company providing a service to Wayne State and Wayne State's employees. *Manhart* expressly held, "[Title VII] was not intended to revolutionize the insurance and pension industries." 435 U.S. at 717. We decline to hold that an insurance company may become liable under Title VII simply by furnishing its services to a Title VII employer.

An insurance company is not bound by Title VII because it furnishes its services to a Title VII employer. The reverse is not true. A Title VII employer cannot avoid its liabilities under the statute by claiming it has selected services which "happen" to

discriminate against women. Wayne State emphasizes that Teachers Annuity's acts are lawful, that Teachers Annuity contracts directly with Wayne State employees, and that Wayne State's role is primarily administrative rather than policy-making. None of these facts relieves Wayne State of responsibility for *choosing* Teachers Annuity's retirement plan for its employees. Accordingly, Wayne State would be liable under Title VII if Teachers Annuity's plan discriminated against female annuitants. We hold, however, that the use of sex-segregated mortality tables to calculate retirement annuities does not violate Title VII if the actuarial value of the annuities is equal for similarly situated women and men.

"It is well established under Title VII that claims of employment discrimination . . . may arise in two different ways." *Furnco Construction Co. v. Waters*, 438 U.S. 567, 581-582 (1978) (Marshall concurring in part and dissenting in part). The plaintiff must show either "disparate treatment" or "disparate impact." "The central focus of the inquiry . . . is always whether the employer is treating 'some people less favorably than others *because of* their . . . sex.' " *Id.* at 577 (emphasis added) *citing International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977).

The District Court determined that Wayne State had violated Title VII without first finding either "disparate treatment" of women by Wayne State or a "disparate impact" on women of a Wayne State policy. Rather, the court relied *solely* on the holdings and dicta of *Manhart. Peters*, 476 F. Supp. at 1349. *See also Spirit v. TIAACREF*, Nos. 79-7715, 7737, and 7739 (2d Cir. decided Sept. 29, 1982); *EEOC v. Colby College*, 589 F.2d 1139 1st Cir. 1978). Careful analysis of Wayne State's actions reveals neither disparate treatment nor disparate impact. In short, there is no evidence that Wayne State treats women less favorably than men *because of* their sex.

Disparate treatment occurs when an employer bases employment decisions on an impermissible criterion, such as sex. An employer need not treat women and men in exactly the same manner. Title VII merely forbids the employer from acting

with the intent to discriminate. *Furnco Construction Co. v. Waters*, 438 U.S. at 579-580. *See also Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

The Supreme Court has repeatedly discussed the proof requirements in disparate treatment cases. The plaintiff has the initial burden of showing that the employer's practices, "otherwise unexplained, are more likely than not" impermissibly motivated. *Id.* at 254, *citing Furnco*, 438 U.S. at 577. After the plaintiff has made out a prima facie case, the defendant has the opportunity to rebut the presumption of discrimination by showing a "legitimate non-discriminatory reason" for its decision. *Burdine*, 450 U.S. at 254; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Finally, the plaintiff has the opportunity to show that the defendant's "reason" is a pretext to mask a discriminatory decision. *McDonnell Douglas*, 411 U.S. at 804. In all cases, the plaintiff retains the ultimate burden of persuading the trier of fact that the employer intentionally discriminated. *Burdine*, 450 U.S. at 256.

In the present case, Wayne State's retirement plan differentiates between women and men. Female annuitants receive smaller monthly payments than similarly situated male annuitants. Wayne State rebutted this prima facie showing of disparate treatment by articulating a legitimate non-discriminatory reason for treating female and male annuitants differently. Sex-segregated mortality tables are used to calculate payments according to accepted actuarial practices; the tables are sex-segregated simply because women live longer than men. Women receive smaller annuities over a longer period of time to ensure that the value of the retirement plan for women and men is equal.

Plaintiffs failed to carry their ultimate burden of persuasion under the *Burdine* analysis. They did not demonstrate at trial that Wayne State's motivation was discriminatory or improper in any way. Plaintiffs did not show that Wayne State's reliance on longevity to calculate benefits was a pretext to mask its intention to disadvantage and harm female annuitants. Wayne

State has not violated Title VII according to a disparate treatment analysis.

Neither has Wayne State violated Title VII according to a disparate impact analysis. A disparate impact occurs when an employer's facially neutral policy burdens one class more than another. "[P]ractices that are fair in form, but discriminatory in operation" produce a "disparate impact." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). *See also Dothard v. Rawlinson*, 433 U.S. 321 (1977); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). To defend against a claim of disparate impact, an employer must show that its practice is necessarily and closely related to a business purpose. *Griggs*, 401 U.S. at 431.

Plaintiffs in this case claim that Wayne State's retirement plan has a disparate impact on women because women receive smaller monthly annuity payments than men. Plaintiffs focus on one fact, that the monthly checks received by women and men differ; they disregard all other aspects of the retirement plan. The District Court's focus and conclusion agreed with the plaintiffs'. "[T]he use of separate mortality tables . . . is discriminatory as applied to an individual woman annuitant." 476 F. Supp. at 1349. Both the District Court and the plaintiffs rely solely on *Los Angeles v. Manhart* for the proposition that "employer pension plans must be non-discriminatory on an individual basis, rather than on class basis." *Id.*

In *Manhart* the Supreme Court invalidated Los Angeles' retirement programs because the city required women to contribute more than men to receive equal retirement benefits. The difference in contribution rates stemmed from standard mortality tables reflecting the fact that women as a group live longer than men as a group. The city deducted the contributions directly from all employees' paychecks. The Court acknowledged the validity of the mortality tables but declared that Title VII protects *individuals*, not groups. The Court found the city liable for sex discrimination against each individual woman who received less take-home pay than a man for the same job.

Two significant factual differences exist between *Manhart* and the present case. In *Manhart* the employer deducted retirement contributions at different rates from employees' paychecks. Because women were required to contribute more than men, women effectively earned less money than men for the same jobs. Women and men employees at Wayne State contribute the same amount to the retirement plan. Consequently they receive equal compensation. Furthermore, in *Manhart* the employer operated the pension fund. The city collected the contributions, managed the accumulated money, and calculated the disbursement rates. Wayne State does not operate the pension fund for its employees. Rather Teachers Annuity, an independent insurance company, manages the accumulated money in the individual accounts and calculates the disbursement rates.

These factual differences are significant because the Supreme Court expressly limited its *Manhart* holding along these lines: "All that is at issue today is a requirement that men and women make *unequal contributions* to an *employer-operated* pension fund." 435 U.S. at 717 (emphasis added). The Court's primary concern, that women received smaller paychecks for the same work, is not a factor in the present case.

Two landmark industrial benefits cases preceded *Manhart*, *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), *reh. denied*, 429 U.S. 1079 (1977), and *Geduldig v. Aiello*, 417 U.S. 484 (1974). In both these cases the employer offered a disability benefits plan which excluded pregnancy as a disability. The Supreme Court found no sex discrimination under Title VII, in *Gilbert*, or under the Equal Protection Clause, in *Geduldig*. The plaintiffs failed to demonstrate either disparate treatment or a disparate impact from the exclusion of pregnancy as a disability.

Like *Gilbert* and *Geduldig*, the present case concerns a benefit plan, not employee wages. In all three cases, the employers paid or required equal contributions for both women and men. Justice Rehnquist's analysis in *Gilbert* quoting *Geduldig* controls the present case:

> As in Geduldig, we start from the indisputable baseline that "[t]he fiscal and actuarial benefits of the program . . . accrue to members of both sexes," 417 U.S., at 497 n.20.
>
> * * *
>
> The "package" going to relevant identifiable groups we are presently concerned with—General Electric's male and female employees—covers exactly the same categories of risk, and is facially nondiscriminatory in the sense that "[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." Id., at 496-497 . . . .
>
> As there is *no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme.*

429 U.S. at 138-139 (citations and footnotes omitted) (emphasis added). For the same reasons we hold that Wayne State's retirement benefits package which offers female and male annuitants benefits of equal value does not violate Title VII. The retirement plan is not worth more to men than to women.

Common sense supports this holding. Plaintiffs point out that individual women may not live to the predicted statistical age of death and, therefore, may not recover the full actuarial value of their retirement packages. This argument is equally true for men. After death the total benefits received could be calculated to determine whether a man or a woman has received more money. But because annuity payments must be calculated prior to death, insurers and employers must use the only tools available to calculate payments, mortality tables. Both women and men may not live to the predicted statistical age but both women and men have the *same probability* of living to the predicted statistical age.

Gender neutral tables would not "equalize" the treatment of women and men. If annuities were calculated on gender neutral tables, women and men would receive equal payments. However, Wayne State would have to contribute more to a

woman's retirement fund than to a man's. Consequently men would receive less immediate compensation. Furthermore, women living to the predicted statistical age for women would receive greater total benefits than men living to the predicted statistical age for men.

The retirement plan which Wayne State offers its employees differentiates between women and men on the basis of longevity solely. Wayne State's selection of a retirement plan which calculates annuities from sex-segregated mortality tables is not the "kind of 'artificial, arbitrary and unnecessary barrier to employment' which the Court found to be the intention of Congress to remove." *McDonnell Douglas*, 411 U.S. at 806, *quoting Griggs*, 401 U.S. at 431. It is not a "built-in headwind" unrelated to an individual's longevity because longevity cannot be measured on an individual basis. We conclude that Wayne State has not violated Title VII by providing women and men equal retirement annuity benefits with different disbursement rates.

Because our decision on the issue of Title VII liability disposes of the case, we need not address the other issues raised by the parties.

The decision of the District Court is reversed.